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# REGULATORY APPROACHES TO TELEVISION NETWORK CONTROL OF THE PROGRAM PROCUREMENT PROCESS: AN HISTORICAL PERSPECTIVE

## I. Introduction

On December 10, 1974, the United States Department of Justice initiated separate civil antitrust suits under sections one and two of the Sherman Act<sup>1</sup> against the three national television networks.<sup>2</sup> In substance, each complaint alleges that the networks have exercised their control over broadcast time in such a way as to monopolize prime-time<sup>3</sup> television entertainment programming.<sup>4</sup> The complaints further assert that the networks have improperly exercised such control in order to exclude those entertainment programs in which they acquire no financial or proprietary interests.<sup>5</sup> The net effect of this practice, the government avers, has been to concentrate ownership and control of television programming in the networks, unreasonably restrain competitive practices in the television industry, and deprive the viewing public of the benefits of free-market competition.<sup>6</sup> Accordingly, the Justice Department is seeking any relief which will dissipate the effects of the networks' activities and restore competitive conditions to the television entertain-

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1. 15 U.S.C. §§ 1-2 (1970 & Supp. IV 1976).

2. *United States v. American Broadcasting Co.*, Civ. No. 74-3600 (C.D. Cal., filed Dec. 10, 1974); *United States v. National Broadcasting Co.*, Civ. No. 74-3601 (C.D. Cal., filed Dec. 10, 1974); *United States v. Columbia Broadcasting System, Inc.*, Civ. No. 74-3599 (C.D. Cal., filed Dec. 10, 1974).

3. Prime-time denotes the television network broadcast schedule between the hours of 7:00 P.M. and 11:00 P.M. See 47 C.F.R. § 73.658(k)(1), (1978).

4. See Complaint at 7-8, *United States v. Columbia Broadcasting System, Inc.*, Civ. No. 74-3599 (C.D. Cal., filed Dec. 10, 1974) [hereinafter cited as CBS Complaint]. News, public affairs, documentary and sport programs produced by the networks are not affected by the suits, nor do the complaints challenge the affiliation agreements between the networks and their local affiliated stations. [1979] 4 TRADE REG. REP. (CCH) ¶ 45,074, at 53,596-7 (Statement of Assistant Attorney General Thomas E. Kauper).

5. See CBS Complaint, *supra* note 4, at 8-9. All complaints additionally allege improper network practices vis-a-vis television and non-television exhibition and distribution of theatrical motion picture films. CBS and ABC are additionally charged with other offenses. *Id.* at 9. See also Complaint, *United States v. American Broadcasting Co.*, Civil No. 74-3600 (C.D. Cal., filed Dec. 10, 1974) [hereinafter cited as ABC Complaint].

6. See CBS Complaint, *supra* note 4, at 9.

ment program industry.<sup>7</sup> Regardless of its eventual resolution, the present litigation will assuredly alter network structure and policy.

These civil actions duplicate, in part, a prior, decade-long inquiry by the Federal Communications Commission (FCC) into network program procurement practices.<sup>8</sup> Commenced in 1959, this FCC study led to the promulgation of rules intended to regulate the procurement process.<sup>9</sup> Although these rules have curbed several evils formerly associated with network power, commentators have argued that their net effect has been to solidify the economic base of network programming control.<sup>10</sup> Presently, confronted with the Justice Department suits, the FCC has re-examined its position with regard to its current rules and has commenced a parallel inquiry of its own.<sup>11</sup> Thus, there exists a possibility that conflicting or duplicative regulatory schemes will result.

This Comment will discuss the network television program procurement process and examine the current FCC and Justice Department inquiries. From this comparison will emerge not only a critical appraisal of network market power in the program procurement process but also an evaluation of the problems inherent in overlapping regulatory schemes. Part II will briefly sketch current television programming practices and the program procurement process. Part III will discuss the original FCC inquiry into programming abuses and will offer some theories as to why the subsequently promulgated rules served only to concentrate network economic power and exacerbate program procurement abuses. Part IV will review the current Justice Department suits against the three national networks and discuss the networks' alleged Sherman Act violations. Part V will assess the viability of the renewed FCC investigation

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7. See, e.g., *id.* at 10-11.

8. See Competition and Responsibility in Network Broadcasting, Report and Order, 23 F.C.C.2d 382 (1970) [hereinafter cited as Network Broadcasting] discussed in notes 65-81 *infra* and accompanying text. The television network program procurement process is discussed in notes 12-37 *infra* and accompanying text.

9. See text accompanying notes 85-95 *infra*.

10. See, e.g., Schuessler, *FCC Regulation of the Network Television Program Procurement Process: An Attempt to Regulate the Laws of Economics?*, 73 NW. U. L. REV. 227, 299-302 (1978) [hereinafter cited as Schuessler]; Note, 29 RUTGERS L. REV. 902, 912-14 (1976); Crandall, *The Economic Effect of Television-Network Program Ownership*, 14 J.L. & ECON. 385, 408 (1971-1972) [hereinafter cited as Crandall].

11. See Commercial Television Network Practices, Notice and Inquiry, 62 F.C.C.2d 548 (1977) [hereinafter cited as Network Practices].

into network practices in light of the pending litigation.

## II. The Program Procurement Process

A television network is composed of independent licensees which derive a substantial portion of their daily programming requirements from a centralized source, the network corporation.<sup>12</sup> The network corporation obtains programs, secures sponsorship through the sale of advertising time, and offers a continuous, coordinated program schedule to its affiliates.<sup>13</sup> This relationship affords the network corporation the conditional right to sell its affiliates' air time to advertisers and to supply programming and promotional announcements which may be broadcast at the discretion of the affiliate.<sup>14</sup> In turn, the affiliate is compensated by the network corporation for broadcasting such programming through its participation in network advertising revenues.<sup>15</sup>

The network corporation, in order to meet its programming obligations to the affiliates, must ensure a continuous stream of entertainment programs. The networks presently have three such sources

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12. See Competition and Responsibility in Network Television Broadcasting, Notice of Proposed Rulemaking, 45 F.C.C. 2146, 2146 n.2 (1965) [hereinafter cited as Proposed FCC Rulemaking]. At present, three national television networks are engaged in commercial broadcasting: The American Broadcasting Company (ABC), The National Broadcasting Company (NBC), and the Columbia Broadcasting System, Inc. (CBS). A fourth network, DuMont, withdrew from the television market in the 1950's. *Id.*

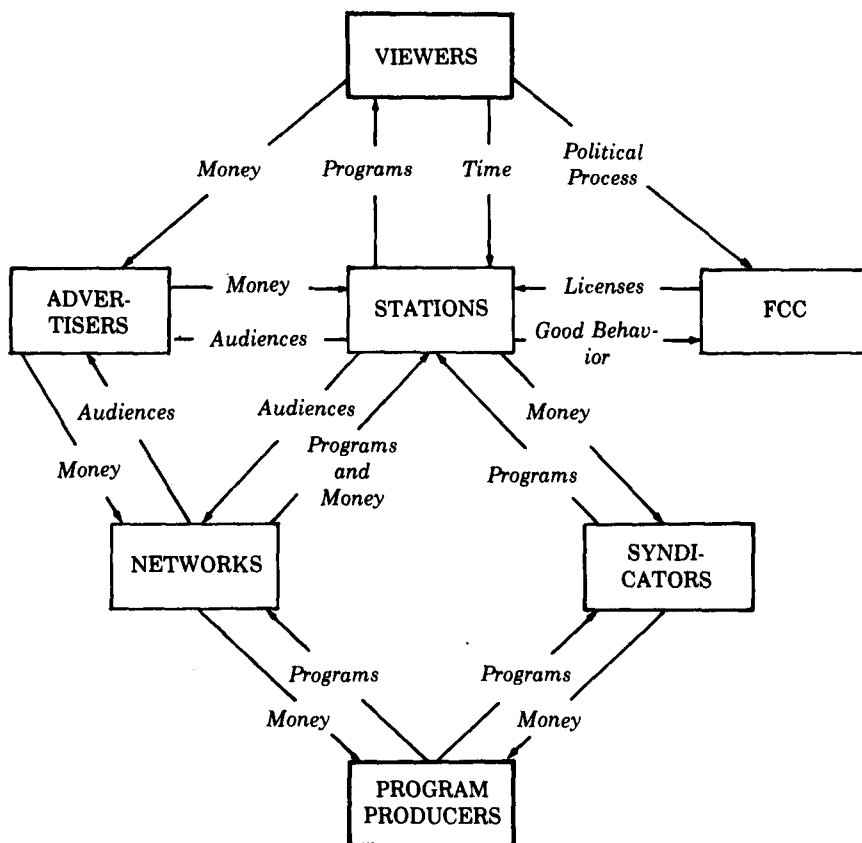
13. See Network Practices, *supra* note 11, at 551. The corporation-affiliate system is interconnected through facilities provided by the American Telephone and Telegraph Co., as a common carrier, on the basis of tariff rates fixed by the FCC. See Proposed FCC Rulemaking, *supra* note 12, at 2146 n.2.

14. Proposed FCC Rulemaking, *supra* note 12, at 2146 n.2. See also B. OWEN, J. BEEBE & W. MANNING, TELEVISION ECONOMICS 97-101 (1974) [hereinafter cited as OWEN]; R. NOLL, M. PECK & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION, 60-63 (1973) [hereinafter cited as NOLL & PECK].

15. See, e.g., Clancy, *The Broadcasting Station and its Relationship with the Network*, reprinted in 72 PRACTISING LAW INSTITUTE, LEGAL AND BUSINESS PROBLEMS OF TELEVISION AND RADIO 11-39 (1976) [hereinafter cited as Clancy]. See also Bryant, *Historical and Social Aspects of Concentration of Program Control in Television*, 34 L. & CONTEMP. PROB. 610, 623 (1969) [hereinafter cited as Bryant]. A graphic representation of the television network structure is set out in OWEN, *supra* note 14, at 7:

of programming:<sup>16</sup> advertisers,<sup>17</sup> the networks' own production facilities,<sup>18</sup> and independent suppliers.<sup>19</sup>

Advertiser-originated programs are characterized by the absence of network participation in creative decision making.<sup>20</sup> In this in-



16. See generally FCC TELEVISION NETWORK PROGRAM PROCUREMENT, H.R. REP. NO. 281, 88th Cong., 1st Sess. 66-74 (1963) [hereinafter cited as NETWORK PROGRAM PROCUREMENT]. See also Crandall, *supra* note 10, at 388-89.

17. Crandall, *supra* note 10, at 388-89.

18. *Id.*

19. *Id.*

20. *Id.* at 387-88. Strictly speaking, approval must be sought from the network which will eventually broadcast the program. Advertisers must also adhere to network standards regarding decency, taste, etc. *Id.*

stance, only the advertiser and program producer participate in the production process. The network sells broadcast time to the sponsoring advertiser; a percentage of this revenue is remitted to the affiliates.<sup>21</sup> In the case of internally-produced network programming, the network assumes all financial risks, exerts unilateral artistic control, and retains a substantially larger share of income from the sale of commercial air time to sponsoring advertisers.<sup>22</sup> Despite these two sources, most television entertainment programming is supplied by independent producers who act as joint venturers with the participating network.<sup>23</sup>

Joint participation ventures between network and independent suppliers have traditionally been shrouded in secrecy. The initial step is nearly always identical: someone approaches a network executive with a program idea.<sup>24</sup> The originator may be a major program supplier or independent "packager;"<sup>25</sup> occasionally, the idea originates with a writer or director.<sup>26</sup> Regardless of origin, a television network may receive in excess of 1,800 program ideas from legitimate outside sources within a calendar year.<sup>27</sup> From these submissions network executives select a very small percentage for subsequent development.<sup>28</sup> Program development usually involves a

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21. See Clancy, *supra* note 15, at 11-39.

22. See Crandall, *supra* note 10, at 388.

23. *Id.*

24. W. PALEY, AS IT HAPPENED 259 (1979) [hereinafter cited as PALEY]. Mr. Paley, a revered figure in the broadcasting industry, served as Chairman of CBS during several decades of unrivalled CBS market dominance.

25. The terms "producer" and "packager" are virtually synonymous in industry parlance. Current major program suppliers include MCA-Universal Television, Warner Bros. Television, and Paramount Television. Prominent independent "packagers" include Lorimar Productions, Spelling-Goldberg Productions, T.A.T. Communications, and M.T.M. Enterprises. PALEY, *supra* note 24, at 259-61.

26. *Id.* Granting contemporary cross-promotional savvy, ideas may originate with literary agents, publishing executives, recording industry promoters, etc. The permutations are endless. It is not uncommon for a programming executive to originate an idea and then seek a producer to develop it into submittible form. See generally FOSTER, UNDERSTANDING BROADCASTING 240-43 (1978).

27. See PALEY, *supra* note 24, at 259-61. See also R. SHANKS, THE COOL FIRE 143 (1976) [hereinafter cited as SHANKS].

28. For example, in 1971, 1,100 programming ideas were received at CBS. Of these submissions, approximately fifty were selected for development into teleplays. Thompson, *How A Network Boss Picks Shows*, LIFE, Sept. 10, 1971, at 46-50. In the course of the 1978-79 program season, CBS selected approximately 200 ideas for development. PALEY, *supra* note 24, at 259-61.

"step deal" wherein a network enters into a series of conditional commitments through which an idea evolves into a "treatment"<sup>29</sup> or outline and, later, into successive drafts of a teleplay.<sup>30</sup> Occasionally, a network may commit itself to the production of a program or program series solely on the basis of a treatment or teleplay.<sup>31</sup> More commonly, however, a network will refuse to enter into any such commitment until one or more "pilot" programs<sup>32</sup> have been produced.<sup>33</sup> Thereafter, the pilot is often the subject of considerable market research and analysis.<sup>34</sup> Once the evaluation phase has been completed, a network may exercise its irrevocable option to order a series of programs based on the original program idea.<sup>35</sup> Thus, throughout the course of the development process, a network invests substantial risk capital not only in financing those activities directly related to the development of the program, but also by incurring a host of ancillary expenses related to the network-supplier relationship.<sup>36</sup> The result of this approach is that the network retains creative control over all program elements.<sup>37</sup>

The present Justice Department and FCC investigations into this network program procurement process reflect the notion that the

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29. A treatment usually consists of a narrative outline of indeterminate length intended to provide a basis for assessing the potential of an idea as a television or motion-picture entertainment vehicle. See, e.g., R. LEE & R. MISIOROWSKI, *SCRIPT MODELS* (1978).

30. A teleplay is a script intended for television production. See generally C. TRAPNELL, *TELEPLAY* (1974).

31. SHANKS, *supra* note 27, at 259-61.

32. A pilot program is a representative episode of a proposed television series produced in order to assess the viability of the series concept. In recent years, it has become customary to broadcast discarded pilots during a network's re-run summer schedule. See Flynn, *Acquisition of Programs for Broadcasting*, reprinted in 72 PRACTISING LAW INSTITUTE, *LEGAL AND BUSINESS PROBLEMS OF TELEVISION AND RADIO* 47 (1976) [hereinafter cited as Flynn]. Pilots for one-hour programs are produced with running times of ninety or 120 minutes, so as to permit the networks to salvage their programming failures as "Movies of the Week" or similar fare. *Id.*

33. See *id.* at 57 (Sample Network Contract (ABC)).

34. See PALEY, *supra* note 24, at 259-61. In 1971, CBS selected six of fifteen pilots for production as television series. *LIFE*, Sept. 10, 1971, at 46-50.

35. See Flynn, *supra* note 32, at 52.

36. These may include a total or ratable segment of the producer's overhead costs, as well as any reasonable fees incurred in the solicitation of program talent, and, occasionally, attorneys' fees and personal expenses related to program development. Flynn, *supra* note 32, at 51.

37. *Id.* at 52. Another result is that the network acquires a proprietary interest in the program which later becomes a source of revenues to be recouped from network exhibition. See Crandall, *supra* note 10, at 388-89; Bryant, *supra* note 15, at 388-89.

networks, by virtue of their preferred position and exclusive access to the limited broadcast frequencies, have coerced commitments from independent program suppliers, which the networks would not otherwise have been able to obtain under competitive market circumstances.<sup>38</sup> In addition, the networks are charged with foreclosing television access to those program suppliers which have refused to grant financial concessions.<sup>39</sup> The substance of these allegations is as old as broadcasting itself, and relate back to the origins of television broadcasting and the establishment of the FCC.

### III. The Original FCC Inquiry and the Establishment of the Program Procurement Rules

The Communications Act of 1934<sup>40</sup> grants the FCC the power to regulate the radio, television and other communications industries.<sup>41</sup> Although the FCC is accorded broad discretion in the exercise of its regulatory mandate, its actions must always be prompted by the "public interest, convenience or necessity."<sup>42</sup> Formulation of an effective FCC policy has often been impeded because of this imprecise standard.<sup>43</sup> Yet, the FCC has consistently sought to foster competition in the broadcast industries.<sup>44</sup> Accordingly, in order to restrain monopolistic tendencies already developing at the time of the Communications Act's passage,<sup>45</sup> the Act expressly provides that the broadcast industry is subject to the antitrust laws.<sup>46</sup> In *United States v. Radio Corporation of America*,<sup>47</sup> the Supreme

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38. See, e.g., CBS Complaint, *supra* note 4, at 9.

39. *Id.* at 8.

40. 47 U.S.C. §§ 151-609 (1976).

41. *Id.* § 151. The telephone and telegraph industries are "common carriers" subject to FCC jurisdiction. *Id.* §§ 201-222.

42. *Id.* § 309(a). A former FCC Commissioner had characterized the phrase as furnishing the "battleground for broadcasting's regulatory debate." N. MINNOW, *EQUAL TIME: THE PRIVATE BROADCASTER AND THE PUBLIC INTEREST* 8 (1964). See also E. KRASNOW & L. LONGLEY, *THE POLITICS OF BROADCAST REGULATION* 15-17 (1978) [hereinafter cited as KRASNOW & LONGLEY].

43. KRASNOW & LONGLEY, *supra* note 42, at 15.

44. See HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, *NETWORK BROADCASTING*, H. R. REP. NO. 1297, 85th Cong., 2d Sess. 1, 54 (1958) [hereinafter cited as NETWORK REPORT].

45. See W. EMERY, *BROADCASTING AND GOVERNMENT* 42 (1976) [hereinafter cited as EMERY]. See also *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1959).

46. 47 U.S.C. § 313 (1962). Section 313 additionally provides for the revocation of a broadcaster's license subsequent to conviction on an antitrust charge. *Id.* Section 311 prohibits the FCC from granting subsequent license authorization to the convicted party. *Id.* § 311. See also EMERY, *supra* note 45, at 42.

47. 358 U.S. 334 (1959).



Court held that the Act allows the Justice Department to bring independent civil or criminal antitrust actions even after an FCC administrative resolution of the same matter.<sup>48</sup>

In 1938, the FCC responded to a virtual absence of competition among radio networks and their affiliates by promulgating the Chain Broadcasting Rules.<sup>49</sup> These rules struck at the restrictive contractual relations between network broadcasters and their affiliates by forbidding practices such as network control over affiliate station rates,<sup>50</sup> exclusive affiliation of stations,<sup>51</sup> territorial exclusivity,<sup>52</sup> and "option time."<sup>53</sup> The rules withstood challenge in *National Broadcasting Co. v. United States*,<sup>54</sup> where the Supreme Court recognized the FCC's comprehensive mandate to remedy anti-competitive practices in the communications industries.<sup>55</sup>

Subsequent to the promulgation of the Chain Broadcasting Rules, the television networks grew and developed in much the same way as had the radio broadcasters. By 1955, the television industry was characterized by a market structure in which independent suppliers bargained directly with advertisers, as well as with the national networks, for acquisition of programming fare.<sup>56</sup> This structure gradually deteriorated in the following decade.<sup>57</sup> Several factors, most notably the soaring cost of program production,<sup>58</sup> hastened this dete-

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48. *Id.* at 346.

49. See 6 Fed. Reg. 2282, 5258 (1941) (current version at 47 C.F.R. § 73.658(a),(b),(d),(h) (1978)). The Communications Act of 1934 defines "Chain Broadcasting" as "simultaneous broadcasting of an identical program by two or more connected stations." 47 U.S.C. § 153(p) (1976). The Chain Broadcasting Rules were made applicable to the television networks in 11 Fed. Reg. 33 (1946).

50. 6 Fed. Reg. 2282 (1941) (current version at 47 C.F.R. § 73.658(h) (1978)).

51. 6 Fed. Reg. 2282 (1941) (current version at 47 C.F.R. § 73.658(a) (1978)).

52. 6 Fed. Reg. 2282 (1941) (current version at 47 C.F.R. § 73.658(b) (1978)). The provision bars network-affiliate agreements that prevented networks from offering a network program rejected by an affiliate to an independent station in the network affiliate's locality. *Id.*

53. 6 Fed. Reg. 5258 (1941) (current version at 47 C.F.R. § 73.658(d) (1978)). The prohibition on option time prevents a network from irrevocably committing an affiliate to accept network programming on a given date by providing the affiliate with advance notice of the program's air date. *Id.*

54. 319 U.S. 190 (1943).

55. *Id.* at 222-24.

56. See *Network Broadcasting*, *supra* note 8, at 387.

57. *Id.* See also OWEN, *supra* note 14, at 19-21.

58. OWEN, *supra* note 14, at 19-21. For example, the cost of an hour-long program skyrocketed from \$70,000 in 1956 to \$110,000 in 1961. NETWORK PROGRAM PROCUREMENT, *supra* note 16, at 256. One year after the Commission's rulemaking, the cost of a thirty-minute show was

rioration as advertisers abandoned single or dual program sponsorship in favor of one-minute or thirty-second "participations" in program sponsorship.<sup>59</sup> The resulting vacuum virtually guaranteed the networks a position as the sole purchasers of programming and prompted their involvement as joint venturers in the program production field.<sup>60</sup> This development, in turn, spurred the FCC to investigate abuses in the network-controlled program procurement process.<sup>61</sup> Following three years of exhaustive research and analysis, the FCC's Office of Network Study submitted its findings.<sup>62</sup> The report concluded that network practices "unduly restrict and restrain the competitive development of the market for independently produced network television programs."<sup>63</sup> This statement reflected the Commission's view that a massive and fundamental shift in the internal economics of the television industry had occurred, a shift which had transformed the television medium into a "nationwide electronic medicine show, in which the pitchman gathers his crowd with a little free entertainment, then gives his spiel for his cure-all snake oil."<sup>64</sup> Specifically, the Commission made several findings.

Between 1957 and 1968, the share of all programming produced or controlled by the networks during the evening hours rose from 67.2 to 96.7 percent.<sup>65</sup> With regard to entertainment programming alone, network produced or controlled evening programming rose from 64.4 percent to 96.2 percent during the same period.<sup>66</sup> In addition, the Commission discovered a developing pattern of increased network participation in the subsequent syndication<sup>67</sup> of independently-supplied entertainment programming. Between 1957 and 1968, network domestic syndication rights in independently-

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estimated to be \$200,000; a one-hour or ninety minute program was estimated to occasionally exceed \$750,000. *LIFE*, Sept. 10, 1971, at 53.

59. See *Network Broadcasting*, *supra* note 8, at 391. See also OWEN, *supra* note 14, at 20.

60. OWEN, *supra* note 14, at 19-20.

61. See 24 Fed. Reg. 1605 (1959).

62. *NETWORK PROGRAM PROCUREMENT*, *supra* note 16, at 66-74.

63. See *Network Broadcasting*, *supra* note 8, at preface (Letter of Submittal from Ashbrook P. Bryant, Chief of the Office of Network Study to the Commission (Nov. 28, 1962)).

64. *NETWORK PROGRAM PROCUREMENT*, *supra* note 16, at 396 (Testimony of the Dean, College of Journalism and Communications, University of Illinois).

65. See *Network Broadcasting*, *supra* note 8, at 389.

66. *Id.*

67. Syndication refers to the sale and distribution of programming on a station-by-station basis. 47 C.F.R. § 73.658(j) (1978).

supplied programs increased from 15.9 to 23.8 percent;<sup>68</sup> network rights in foreign syndication rose from 23.3 to 24.4 percent.<sup>69</sup> Similarly, the percentage of prime-time entertainment programs in which the networks acquired subsidiary rights and interests rose markedly during the same period.<sup>70</sup> These findings clearly supported the Commission's hypothesis that "the three national networks, for all practical purposes, control the entire network television program procurement process from idea through network exhibition."<sup>71</sup>

Previously, direct program sales to advertisers had benefitted producers because advertisers seldom acquire syndication, profit-sharing, or ancillary rights.<sup>72</sup> These rights represent valuable commercial assets which, in large measure, contribute to the commercial viability of independent producers.<sup>73</sup> Clearly, the shift from advertiser to network creative and financial control resulted in the transformation of a competitive market into an oligopsonistic market favoring broadcasters.<sup>74</sup> For example, in its report, the Commission listed fifteen independent suppliers which regularly provided the networks with quality programming.<sup>75</sup> In a competitive market the programs supplied to the networks by these firms should command substantially better terms than those secured by "one-season" producers. The converse was in fact true: regular suppliers fared little better than their one-season counterparts.<sup>76</sup> Moreover, the networks exacted substantial syndication rights, profit-sharing, and other financial participation from the established independents.<sup>77</sup> The situation was similar with regard to the major motion picture studios.<sup>78</sup> In such instances, although the networks assumed developmental financing for only seventeen of the twenty-seven series sold by the studios in 1964, syndication rights and profit shares were acquired in all.<sup>79</sup> The Commission noted that these rights were

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68. See Network Broadcasting, *supra* note 8, at 392.

69. *Id.*

70. *Id.*

71. *Id.* at 393.

72. See Proposed FCC Rulemaking, *supra* note 12, at 2150.

73. *Id.*

74. *Id.* at 2157.

75. See Network Broadcasting, *supra* note 8, at 388 n.14.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 388.

acquired without any assumption of financial risk by the networks.<sup>80</sup> Clearly, the considerable bargaining power of the studios was of little consequence when compared with the networks' "gatekeeper" status. The Commission remarked that: "A direct relationship appears to exist between new programs chosen for network schedules and network acquisition of subsidiary rights and interests. . . . [V]ery few programs are produced for network exhibition where the network does not get some share in their subsequent earning power through syndication and other rights."<sup>81</sup>

To remedy this situation, the Commission's Second Interim Report<sup>82</sup> recommended that the FCC curtail "the instance and frequency of network control of programs through the acquisition of licenses for network exhibition of the independently produced programs included in their schedules."<sup>83</sup> Acting on these and other recommendations, the FCC proposed rules to govern the program procurement process.<sup>84</sup> The rules were adopted, with substantial modification,<sup>85</sup> on May 4, 1970.<sup>86</sup>

The impact of the rules was to limit network access to affiliates in the "top 50" markets<sup>87</sup> to three hours of network-broadcast programming between eight o'clock and eleven o'clock in the evening.<sup>88</sup>

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80. *Id.* The Commission noted in passing that the data submitted by the networks . . . confirms that no matter how producers are categorized in terms of bargaining power, their entry to the prime-time network television market is accompanied by the transfer of a substantial part of the potential profitability of their products to the purchasers—the networks. The fact that, over the years, the producers have perforce adjusted their methods of doing business and have learned to live with this situation in no way changes the essentially oligopolistic nature of the situation.

Network Broadcasting, *supra* note 8, at 388-89.

81: *Id.* at 393.

82. See NETWORK PROGRAM PROCUREMENT, *supra* note 16, at 101.

83. *Id.*

84. See Proposed FCC Rulemaking, *supra* note 12.

85. The "modification" consisted of the Commission's non-adoption of the "50/50" rule whereby networks would be prohibited from exhibiting network-produced programs in more than fifty percent of their schedule. The rule was jettisoned after ABC (then the weakest network) claimed that it would suffer disproportionate injury.

86. See Network Broadcasting, *supra* note 8, at 382.

87. See 47 C.F.R. §73.658(k)(n.1) (1978). The "Top 50" markets are established by the Arbitron publication Television Market Analysis. *Id.*

88. See *id.* §73.658(k). Exceptions were granted for those programs whose duration is not under strict network control (e.g., sports events), news programs of an unscheduled nature (e.g., fast-breaking news events), and political broadcasts by legally qualified candidates for public office. *Id.*

This rule, eventually recognized as the Prime-Time Access Rule (PTAR I), also provided for the exclusion of "off-network" programming<sup>89</sup> during the access hour. In addition, the Commission adopted rules prohibiting the networks from distributing and sharing in the profits of domestically syndicated programming.<sup>90</sup> The Commission also restricted network syndication activities in foreign markets to those programs which were entirely network-produced.<sup>91</sup> Finally, the networks were prohibited from "warehousing"<sup>92</sup> television programs which they had originally acquired for exhibition.<sup>93</sup> In its conclusion, the FCC expressed its intention to reevaluate the rules on an ongoing basis and amend them in response to the public interest.<sup>94</sup> This approach was wholly consistent with the Commission's time-honored policy of "modest change."<sup>95</sup>

These FCC rules regarding the program procurement process were contested by broadcasters in *Mt. Mansfield Television v. FCC*.<sup>96</sup> A number of television broadcasters, including the three national networks, brought suit claiming that PTAR I restrained freedom of speech, that the FCC had overstepped its statutory authority in the promulgation of the rule, and that insufficient notice had been accorded the claimants prior to the rulemaking.<sup>97</sup> Rejecting each of these claims, the court concluded that rather than violating the first amendment, the Prime-Time Access Rule appeared to be a reasona-

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89. See *id.* "Off-network" programs are those programs which are sold or licensed for exhibition subsequent to or contemporaneous with their original network run; local stations often program them. "Star Trek," originally aired on NBC, is an example of a program that has exhibited greater vitality in off-network syndication than it had during the course of its original run.

90. See *id.* §73.658(j)(1)(ii).

91. *Id.* § 73.658(j)(2).

92. See *id.* §73.658(j)(1)(ii). "Warehousing" refers to the network practice of refusing to exhibit a program in which it has acquired exhibition rights to the detriment of a producer who may wish to re-acquire it for disposition on another network or medium. *Id.*

93. *Id.*

94. See Network Broadcasting, *supra* note 8, at 401. Chairmen Burch and Wells dissented from the agency's action, citing the potential instability of a multiple-station market as a deterrent to market entry by independent producers. *Id.* at 413.

95. *Id.* at 395. The policy is briefly sketched in KRASNOW & LONGLEY, *supra* note 42, at 187. According to the authors, the FCC's "modest" approach has the virtue of being sensitive to audience "feedback" and is capable of revision while implementing change not violative of the ideological consensus. *Id.* at 188, 190. Its principal difficulty is its ability to deal with immediate "bottlenecks" at the expense of failing to resolve long-term difficulties. *Id.* at 189.

96. 442 F.2d 470 (2d Cir. 1971).

97. *Id.* at 479-81.

ble step towards fulfilling that amendment's mandate of encouraging program diversity and promoting contrasting sources of program service.<sup>98</sup> As to the second claim, the court stated that the FCC's regulation of network program procurement was a proper exercise of its ancillary powers to regulate broadcasting in light of the public interest.<sup>99</sup> Finally, the court noted that sufficient time had been afforded claimants to comment on the rule and, in any event, no statute required an agency to "publish in advance every precise proposal which it may ultimately adopt as a rule."<sup>100</sup>

On October 26, 1972, the FCC commenced an inquiry into the viability of PTAR I.<sup>101</sup> This inquiry was prompted by allegations that the rule had failed in its mission of diversifying programming sources and diminishing network power. Critics argued that, quite to the contrary, PTAR I augmented such power.<sup>102</sup> The FCC appeared concerned that, subsequent to the promulgation of PTAR I, the number of independent program suppliers decreased from fifty-

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98. *Id.* at 477. The court supported this position by citing the time-honored notion that the limited character of the electromagnetic spectrum prevents access to it by all parties and, accordingly, imposes a duty on the FCC to regulate those parties granted access. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-90 (1969).

99. 442 F.2d at 479-81.

100. *Id.* at 488 (quoting *California Citizen Band Ass'n v. United States*, 375 F.2d 43, 48 (9th Cir.), *cert. denied*, 389 U.S. 844 (1967)). Subsequent to *Mt. Mansfield*, the FCC established the effective dates of implementation for the financial interest and syndication rules: June 1, (syndication) and August 1, 1972 (financial interest). *Competition and Responsibility in Network Television Broadcasting*, Opinion and Order, 35 F.C.C.2d 411 (1972).

101. Prime-Time Access Rule, Notice of Proposed Rulemaking, 37 F.C.C. 2d 900 (1972) [hereinafter cited as Proposed Rulemaking].

102. *Id.* at 909-11. The allegation stems from a complaint filed by MCA-Universal, Inc., a major program supplier. Industry concerns were reflected in a Time magazine article which stated:

In the 16 months that the regulation has been in effect, it has been an almost perfect boomerang. Instead of promoting original programming, it has sent the local station managers scurrying to producers who imitate hits of the past. Instead of promoting TV production around the country, it has been a boon to Canadian and British producers who can usually deliver programs for much less than their American counterparts. . . . Most of the syndicated entertainment shows that have filled the tube have been produced on low budgets, \$10,000 to \$60,000 per half-hour versus \$100,000 for an average network show of the same length. Cheap game shows have proliferated, and shows that the networks once discarded, such as *The Lawrence Welk Show* and *Hee-Haw*, have been resuscitated.

TIME, June 2, 1972, at 55. Much of the controversy is thoughtfully evaluated in Note, 29 RUTGERS L. REV. 902 (1976).

four in 1970 to forty-three in 1972.<sup>103</sup> "Major" independent producers, it was claimed, had suffered injury by being foreclosed from access to a substantial segment of prime-time, as they customarily relied on the "network process for obtaining exposure for their quality product."<sup>104</sup> Additionally, it has been alleged that the creation of the access hour had caused tangible financial losses among the motion picture studios.<sup>105</sup> After extensive consideration, the FCC promulgated a new prime-time access rule.<sup>106</sup> This new rule, PTAR II, reduced access time to one half-hour between Monday and Saturday in the 7:30 P.M. to 8:00 P.M. time-slot and permitted the use of one access time-slot per week to be used for the presentation of network or "off-network" programming concerned with public affairs or children's issues.<sup>107</sup> The new rule was challenged in *National Association of Independent Television Producers v. FCC*.<sup>108</sup> Although the Court of Appeals for the Second Circuit did not address the merits of the case, it remanded the decision to the FCC, citing the Commission's proposed date for the new rule as too abrupt to allow independent producers the opportunity to avoid economic harm, while also failing to provide the networks with adequate time to make programming changes.<sup>109</sup>

On January 16, 1975, the Commission promulgated yet another version of the Prime-Time Access Rule, PTAR III.<sup>110</sup> Implemented in September 1975, PTAR III essentially heralded a return to PTAR I.<sup>111</sup> The new rule provided for one hour of access time.<sup>112</sup> It differed from PTAR I in that it permitted network infringement of access time through the presentation of network or "off-network" program-

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103. See Prime-Time Access Rule, Report and Order, 44 F.C.C.2d 1081, 1101 (1974). [hereinafter cited as PTAR II].

104. *Id.* at 1101-02.

105. *Id.* Claimants asserted that \$60,000,000 had been lost through the implementation of the access hour. *Id.*

106. *Id.* at 1081.

107. *Id.* at 1149-50.

108. 502 F.2d 249 (2d Cir. 1974).

109. *Id.* at 253-55. The court enjoined the Commission from implementing the rules at any time prior to September, 1975. *Id.*

110. Prime-Time Access Rule, Second Report and Order, 50 F.C.C.2d 829 (1975) [hereinafter cited as PTAR III].

111. *Id.* at 829.

112. *Id.* The Commission later stated: "We do not find persuasive the argument that modification of the rule increases network dominance and returns time to the monopoly whose excesses led to the rule." *Id.* at 846.

ming devoted to children's shows or public affairs.<sup>113</sup> The financial interest and syndication rules were left intact. PTAR III was subsequently upheld in *National Association of Independent Television Producers v. F. C. C. (II)*.<sup>114</sup> This rule is currently in effect.

The effectiveness of PTAR III has been the subject of considerable analysis.<sup>115</sup> As intended, the rule has fostered the development of independent syndication programs. At the same time, however, the rule has operated to consolidate the oligopsonistic power of the networks. PTAR III effectively precludes the networks' "brokerage" function<sup>116</sup> in the "access" period by supplanting their centralized purchasing position with an expanded, decentralized market composed of individual affiliate stations.<sup>117</sup> The result has been the expansion of entry by syndicators into prime-time,<sup>118</sup> without a discernible decrease in the quality of program offerings.<sup>119</sup> This may be partially attributable to affiliate station managers' interest in procuring programming that would lure an audience of sufficient size into watching the evening network schedule of programs. As the Commission anticipated, industry economies have permitted syndicators as well as station managers to reap the profits from the exhibition of syndicated programming.<sup>120</sup> It appears, however, that the

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113. *Id.* at 830.

114. 516 F.2d 526 (2d Cir. 1975). The opinion is worth perusing for its recapitulation of the controversy over PTAR I and PTAR II.

115. See generally note 10 *supra*.

116. See OWEN, *supra* note 14, at 7.

117. See NOLL & PECK, *supra* note 14, at 85-86.

118. This fact alone vitiated the Commission's reasoning that the economics of access-time syndication permitted the relatively unencumbered entry of new suppliers. See Network Broadcasting, *supra* note 8, at 396.

119. "Quality" of course is in the eye of the consumer.

120. Lexington Broadcasting, Inc.'s "Sha Na Na" and ITC, Inc.'s "The Muppet Show" are examples of current, successful access-time programming. In 1978, an episode of "The Muppet Show" cost approximately \$140,000 to produce; the series was purchased for \$200,000 per episode. See *Why TV Syndicators are Striking It Rich*, BUSINESS WEEK, Feb. 28, 1977, at 78.

Similarly, station profits have soared. In 1975, television stations earned \$571.8 million in pre-tax profits; in 1976, these revenues soared in excess of 20%. *Id.* The reason for the syndicator-station manager entente is elementary: it makes economic sense to purchase programs from a syndicator—even at a higher price—and air it instead of a network-originated program. The station can sell commercial time in the program to local and national advertisers and reap up to 10 or 15 times the rates it is paid by the network for carrying one of its programs. BUSINESS WEEK, Feb. 28, 1977, at 78-79 (Interview with Lou Friedland, President MCA-TV). For a dissenting perspective on syndication economics see Schuessler, *supra* note 10, at 289-91.



major effect of the rules has been to make local affiliates more like the networks without fostering localized, individualized programming.<sup>121</sup> In addition, the rules have operated to strengthen network control by concentrating their "program brokerage" function within a smaller time-slot.<sup>122</sup> This results from two factors. First, the Prime-Time Access Rule reduces the prime-time available to independent suppliers, thus enhancing network control over program procurement.<sup>123</sup> Second, the contraction of network prime-time has tended to escalate advertising rates as advertisers compete for reduced national network time, thus permitting networks to reap ever-increasing profits.<sup>124</sup>

It merits note that since the inception of the Program Procurement Rules, the FCC has made additional strides towards restricting network power through collateral methods such as the selective deregulation of cable television systems and the promotion of alternate means of television distribution.<sup>125</sup> These issues will be discussed after a consideration of the Justice Department's response to the rules and the network power the suits seek to curb.

#### IV. The Current Antitrust Litigation

##### A. History

The pending antitrust actions are the product of an inquiry started over two decades ago.<sup>126</sup> This inquiry was originally stayed

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121. See Crandall, *supra* note 10, at 407. Station managers, after all, are beset by the same set of considerations (e.g., mass appeal) confronting a network programmer. *Id.*

122. *Id.* at 408. See also Note, 29 RUTGERS L. REV. 902, 913 (1976).

123. See Note, 29 RUTGERS L. REV. 902, 913-14 (1976).

124. *Id.* In the first year following the implementation of the rules, network pre-tax profits soared 106 percent. *Id.* One commentator has gone further to suggest that independent producers are disadvantaged by the financial interest and syndication rules inasmuch as they "prohibit producers from selling their syndication risks to the networks while prolonging the delay between incurrence of production costs and receipt of syndication revenues, thereby increasing any existing production deficits." Schuessler, *supra* note 10, at 305. Although this may hold true in a majority of cases, established producers with a proven record of profitability are all too eager to accept the risks attendant on self-syndication in anticipation of substantially higher profits. See, e.g., *Viacom International, Inc. v. Tandem Productions, Inc.*, 526 F.2d 593 (2d Cir. 1975) (Tandem, producer of CBS' "All In The Family", "Maude" and "The Jeffersons," sought to re-acquire syndication rights granted to Viacom, a former CBS subsidiary engaged in syndication, prior to the implementation of the Program Procurement Rules).

125. See pt. V *infra*.

126. See *Hearings On Monopoly Problems in Regulated Industries Before The Antitrust*

pending the outcome of the 1959 FCC investigation.<sup>127</sup> Once the Commission's program procurement rules were fully promulgated, the Justice Department commenced the present actions on December 10, 1974.<sup>128</sup>

As the suits proceeded through a protracted discovery phase, the district court, on February 16, 1977, denied a motion to dismiss by the networks. This motion was based on a theory of the networks' implied immunity to the antitrust laws by virtue of the FCC's regulatory power.<sup>129</sup> Several months later, on July 30, 1977, ABC's motion to dismiss or stay the predecessor suit was also denied.<sup>130</sup> On November 28, 1977, after extensive negotiation, the United States and NBC entered into a consent decree.<sup>131</sup> The decree was eventually approved by the court after extensive commentary and submission of memoranda in opposition thereto.<sup>132</sup> On June 20, 1978, the court entered an order compelling the United States to set forth detailed definitions of and a more particularized recital of proposed proofs regarding the relevant market in which the networks' oppres-

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*Subcommittee Of The Judiciary Committee Of The House of Representatives*, 84th Cong., 2d Sess. Ser.22, pt.2 (1956).

127. See pt. III *supra*.

128. The litigation is in most respects identical to suits brought against the networks by the Justice Department on April 14, 1972, and dismissed without prejudice on November 11, 1974. See 65 F.R.D. 415, 418 (C.D. Cal. 1974), *appeal dismissed*, 421 U.S. 940 (1975). The original suits were characterized as coercive efforts by the Nixon administration intended to stifle network criticism of administration policy. Their bizarre history is summarized in Kubin, *The Antitrust Implications of Network Television Programming*, 27 HASTINGS L.J. 1207, 1208-11 (1976) [hereinafter cited as Kubin]; see also SATURDAY REVIEW, Apr. 29, 1972, at 23; NEW REPUBLIC, Apr. 29, 1972, at 9.

129. *United States v. Columbia Broadcasting System, Inc.*, 1977-1 Trade Cases ¶ 61,327 (C.D. Cal.). In its decision, the court relied on *United States v. RCA, Inc.*, 358 U.S. 334 (1959), a case that established the applicability of the antitrust laws to the broadcast industry and removed any barrier to their enforcement by virtue of coextensive FCC action. On a prior motion to dismiss or stay the original 1972 suits, the court ruled that the FCC's primary jurisdiction over the subject matter of the action did not preclude the Justice Department from filing suit. See 1974-1 Trade Cases ¶ 74,885 (C.D. Cal.). The court did not address the immunity issue, because of the defendant networks' disclaimer that implied immunity from the antitrust laws was barred by extant case law. *Id.*

130. 1977-2 Trade Cases ¶ 61,580. The motion for reconsideration was prompted by a declaration of intent by the FCC to conduct an inquiry into the network practices presently being litigated. See Notice of Inquiry, Commercial Television Network Practices, 23 F.C.C.2d 548 (1977).

131. See 1978-1 Trade Cases ¶ 61,855. The settlement was submitted on Nov. 17, 1976. *Id.*

132. See 1978-1 Trade Cases ¶ 61,842.

sive behavior was alleged to have occurred.<sup>133</sup> Subsequent to the government's compliance, the networks moved to dismiss the allegations in a motion for summary judgment.<sup>134</sup> The court dismissed the government's allegation of monopolization in the primary network market<sup>135</sup> but retained the balance of the government's allegations.<sup>136</sup> Additionally, the court found the government's recitals of evidence sufficiently particular to proceed with a trial upon completion of defendant's discovery.<sup>137</sup> Discovery is scheduled for completion in the spring of 1980.<sup>138</sup> Attorneys assigned to the litigation foresee a trial commencing some time during that year.<sup>139</sup>

## B. The Networks' Alleged Antitrust Violations

The government's allegations charge the networks with entering into agreements which suppress competition in violation of section one of the Sherman Act,<sup>140</sup> and with monopolizing or attempting to monopolize the trade and commerce in television entertainment programming during prime-time viewing hours in violation of section two of the Sherman Act.<sup>141</sup> An analysis of these claims<sup>142</sup> is necessary, both to comprehend the Justice Department's motives in prosecuting the present actions and to grasp the altered character of network program procurement in the aftermath of the Commission's 1970 rules.

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133. 1978-2 Trade Cases ¶ 62,394.

134. *Id.*

135. The primary network market is the "relevant market composed of national commercial television network prime-time entertainment programs." *Id.* at 76,380. See notes 194-200 *infra*.

136. 1978-2 Trade Cases ¶ 62,394 at 76,384.

137. *Id.* at 76,383-84. A commentator has suggested that discovery in this suit is valuable insofar as it may make information relating to the manner in which social and political ideas are presented (or not presented) in entertainment programming a matter of public record. See SATURDAY REVIEW, Apr. 29, 1972, at 23.

138. Telephone interview with Eric Branfman, Esq. of Bergson, Borkland, Margolis & Adler, counsel for defendant ABC in the present litigation (Feb. 1, 1980).

139. Telephone interview with John Kolar, Esq., Department of Justice, Antitrust Division (Oct. 25, 1979).

140. 15 U.S.C. § 1 (1976).

141. 15 U.S.C. § 2 (1976).

142. For a discussion of the substance of the Justice Department's claims with respect to network acquisition of financial interests and syndication rights in programming, see pt. III *supra*. These issues will not be reiterated here. Similarly, the network's alleged monopolization of prime-time programming will be discussed only to the extent that it relates to the networks' dealings with independent program suppliers.

### 1. *Sherman Act: Section One Claims*

Section one of the Sherman Act renders illegal any "contracts," "combinations" and "conspiracies" in restraint of trade.<sup>143</sup> Since 1911, the Supreme Court has construed the Act to bar only those restraints which are deemed "unreasonable" in light of all available circumstances.<sup>144</sup> Accordingly, "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."<sup>145</sup> Section one additionally requires a finding of agreement between two or more entities to engage in anticompetitive conduct.<sup>146</sup> Such agreement, however, need not be express, and may be inferred by the courts from a wide range of circumstances, including a "knowing wink" or course of conduct.<sup>147</sup> The Justice Department alleges that the networks have exercised their market power, prior and subsequent to the enactment of the FCC program procurement rules, in such a way as to coerce independent program suppliers to accept anticompetitive provisions in network licensing agreements. Such provisions, the Justice Department claims, are intended to augment network control over program production, exhibition and distribution. Typically, such agreements include:

(i) provisions relating to "pilot" program production<sup>148</sup> which preclude the purchase or broadcast of the pilot by another broadcaster

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143. 15 U.S.C. § 1 (1976).

144. *Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). The standard enunciated in *Chicago Board of Trade* has come to be recognized as the "rule of reason" test.

145. 246 U.S. at 238. The court is obliged to consider the purpose and the effect of the restraint. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 500 (1969). There are, of course, "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and . . . therefore illegal. . . ." *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). Such agreements include tie-in arrangements, agreements to divide markets, price-fixing arrangements, and group boycotts. *Id.* The government's complaint does not allege the perpetration of any such offense by the networks.

146. *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962).

147. *Esco Corp. v. United States*, 340 F.2d 1000 (9th Cir. 1965). This is precisely the government's theory in the suit against the networks. See Memorandum of the United States in Opposition to Defendants' Motion for Summary Judgment on the Sherman Act Claims at 4-5, *United States v. Columbia Broadcasting System, Inc.*, Civ. No. 74-3600 (C.D. Cal., filed Dec. 10, 1974). [hereinafter cited as U.S. Memorandum].

148. See note 32 *supra*.

for an extended period, even where the original covenanting network has no intention of utilizing the pilot;<sup>149</sup>

(ii) provisions relating to program series which contain extensive annual renewal options at preestablished escalation rates. Traditionally, these options extend for a minimum period of five years, in addition to the pilot stage.<sup>150</sup> As very few network series run for periods longer than five years, the options serve to shield the original covenanting network from competitive bids by other broadcasters for the exhibition rights;<sup>151</sup>

(iii) provisions relating to the networks' acquisition of a right of first refusal or first negotiation for renewal of the program series' term of broadcast. Such provisions are said to effectively inhibit bargaining for broadcast rights to the series, even after the annual renewal options have expired;<sup>152</sup>

(iv) provisions which preclude the exploitation of prime-time television programs on any other communications media<sup>153</sup> or market during the term of the original network run;<sup>154</sup>

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149. See Plaintiff's Attachment 2 To Identification Of The Evidence In Support Of The Government's Contention That CBS and ABC Have Violated Sections 1 And 2 Of The Sherman Act at 16, *United States v. American Broadcasting Co.*, Civ. No. 74-3600 (C.D. Cal., filed Dec. 10, 1974) [hereinafter cited as Attachment 2].

150. *Id.* at 18.

151. *Id.* The government, citing the repeated failure of major independent producers to receive more favorable terms, alleges that each defendant has utilized its market power to exact the options. *Id.* at 19.

According to Richard Zimbert, a high-ranking ABC official, the network recognized that where it was required to renegotiate a contract after the expiration of the five-year term, it would not be able to limit the producer to the five percent escalation fee for annual renewals. *Id.* at 20. Universal City Studio's bettering of renewal terms for the "Emergency" and "Bionic Woman" series, subsequent to the expiration of network renewal options, is cited in support thereof. *Id.*

152. *Id.* at 22. Independent producers have indicated that it is difficult to sell a series against a first refusal clause, because every shift in negotiating posture with another party, no matter how trivial, dictates the resubmission of an offer to reacquire the series to the original covenanting network. *Id.* at 23.

153. These include: syndication, pay television, CATV, cassettes and motion picture exhibition. *Id.* at 23. See pt. V *infra*.

154. The exclusivity provisions were found in 100 percent of the network agreements examined by the government. Attachment 2, *supra* note 149, at 23(a). There is testimony to support the Justice Department's contention that the networks may have obtained such exclusivity in order to restrain pay television's development as a theatrical film exhibition medium. *Id.* This result is said to have been accomplished by shortening the period of time that feature films are available for exhibition, and by denying pay television the opportunity to exhibit certain films at all. *Id.* at 23(d). See also *Home Box Office, Inc. v. FCC*, 567 F.2d

(v) provisions which prevent "spinoff"<sup>155</sup> series from being acquired by any party other than the original covenanting network;<sup>156</sup>

(vi) provisions which bar the syndication of independently produced programs by any other broadcaster during the period of the original network run;<sup>157</sup>

(vii) provisions which permit little or no adjustment in the producer's fee to reflect the success of his program on the network.<sup>158</sup> In effect, the networks' demand for long-term options "lock-in" an independent producer and his product at pre-set rates. Thus, a closed market is created.<sup>159</sup>

Intrinsic to the bargaining process, but seldom memorialized, is the networks' alleged practice of requiring independent suppliers to utilize network-owned production facilities as a condition for licensing their programs.<sup>160</sup> Apart from network licensing agreements, a particularly disturbing development for many independents has been the proliferation of the "talent hold" agreement, whereby a network contracts with creative talent for protracted periods of net-

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9, 40-43 (1977) The networks' need for exclusivity, it is claimed, is all the more puzzling in light of pay-television's relatively small audience and unintentional ability to enhance the appeal of network-exhibited programs. Attachment 2, *supra* note 149, at 23(i). In comments submitted before the FCC, ABC submitted no evidence to support its contention that contractual exclusivity is necessary to protect the value of its theatrical film licenses. *Id.* See Comments of American Broadcasting Company, Inc., in FCC Docket No. 20402, Sept. 26, 1975, at 32. In fact, it has been asserted that pay-television exhibition may actually boost the popularity of network-exhibited programming through advance word-of-mouth publicity and through the "spill-over" effect of pay-television exhibitor's advertisements in other media. Attachment 2, *supra* note 149, at 23(j).

155. A "spinoff" may be regarded as new and different program suggested by the original licensed program. Attachment 2, *supra* note 149, at 24.

156. ABC agreements customarily prevent the use of continuing characters (a character appearing in more than 3-7 episodes) in spinoffs other than those acquired by ABC. *Id.* at 25. The network's insistence on a one-year, non-negotiable period during which the network has exclusive rights to the spinoff is said to effectively foreclose other networks or broadcasters from bidding for the program. *Id.* at 24.

157. See Attachment 2, *supra* note 149, at 26. There is evidence to suggest that syndication would not affect the prime-time ratings of the original network program even if it were broadcast on another network. *Id.* at 26-27.

158. *Id.* ABC licensing agreements customarily limit license fee escalations to five percent or less in each year after the first. *Id.* Similarly, producers are customarily not afforded the right to share in the networks' gross or net income. *Id.*

159. *Id.* at 29.

160. Attachment 2, *supra* note 149, at 34. This practice was found to occur even in those cases where non-network production facilities were seen as considerably less expensive. *Id.* at 34-5.

work exclusivity.<sup>161</sup> These agreements are said to place independents at a competitive disadvantage, inasmuch as they are not in a position to guarantee network exposure to creative talent. Their disadvantage is compounded by the networks' alleged practice of coercing independent suppliers to accept network contract players even though such contracts may contain prohibitive financial terms that producers are obliged to bear.<sup>162</sup> By compelling their acceptance, networks are free to reap the benefits of artist exclusivity while simultaneously minimizing its cost.<sup>163</sup>

The Justice Department concludes its charges by alleging that network control of affiliate station groups, effected through network demand for high affiliate clearance rates,<sup>164</sup> has effectively foreclosed the market for prime-time syndicated programming outside of the access period.<sup>165</sup> This control, when coupled with parallel price setting behavior<sup>166</sup> among the networks and the networks' ability to preempt independently produced programming<sup>167</sup> on their schedules by self-producing through their internal facilities and motion picture producing subsidiaries,<sup>168</sup> has left independent suppliers with

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161. See *id.* at 48. As of August 22, 1975, ABC had one or two individuals under such contracts; by 1977 the number had risen to 39. *Id.*

162. *Id.* The "talent hold" agreements also prevent producers from negotiating deals with rival networks for the exhibition of television programs whose original exclusivity may have lapsed because a performer who is vital to the program's identification is still under contract to the original network. *Id.* In a well-publicized dispute, Universal Television's bargaining position in transferring the "Bionic Woman" series from ABC to NBC was impaired when ABC asserted its right to retain the "Oscar Goldman" character, common to both the "Bionic Woman" and "Six Million Dollar Man" series. *Id.* at 52.

163. *Id.* at 52(C)-(E).

164. "Clearance Rate" is a measure of the number of programs which an affiliated station accepts for broadcast from its network. Attachment 2, *supra* note 149, at 31. Clearance rates for ABC affiliates, for example, fluctuated from 94% to 97% in the period 1965-1971. *Id.* at 32.

165. *Id.* As stated previously, the networks' high clearance rate demands were accompanied by a gradual contraction in the number of buyers of prime-time programming from fifty or so during the 1950's to the three networks today. See notes 56-60 *supra* and accompanying text.

166. See Attachment 2, *supra* note 149, at 58-68. Note that, of itself, conscious parallelism is not unlawful, nor does it conclusively establish agreement. *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540-41 (1954).

167. See Attachment 2, *supra* note 149, at 44.

168. ABC owned ABC Circle Films, Inc., while competitor CBS established Cinema Center Films, Inc. See Attachment 2, *supra* note 149, at 45. In seeming indifference to the pending litigation, ABC has recently announced its intention to resume production of theatrical feature films after nearly a decade of inactivity. See *N.Y. Times*, July 13, 1979, at C12, col.3.

no alternative other than compliance with the networks' allegedly oppressive program procurement practices.

The networks counter these arguments in the following ways:<sup>169</sup>

(i) The networks assert that the acquisition of entertainment programming involves the assumption of considerable entrepreneurial risk due to the considerable expense and uncertainty associated with program production.<sup>170</sup> In exchange for assuming the risk, the network acquires not the fee simple to a discrete piece of property but rather an intricate bundle of rights which it must exploit in order to recoup its investment.<sup>171</sup>

(ii) The networks assert that control of programming, whether effected by the acquisition of financial interests, restrictive contractual provisions, or otherwise, has not suppressed competition among program suppliers.<sup>172</sup> Even if such strategies were to result in a suppression of competition, it would be inherently incredible for the networks to adopt such a course inasmuch as competition tends to result in lower prices, higher quality and increased supply.<sup>173</sup>

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CBS has likewise signalled its intention to return to the motion picture production arena. See *Variety*, Oct. 10, 1979, at 1, col.2.

169. See Defendant's Notice of Memorandum In Support of Its Motion For Summary Judgment On The Sherman Act Claims, *United States v. Columbia Broadcasting System, Inc.*, Civ. No. 74-3599 (C.D. Cal., filed Dec. 10, 1974) [hereinafter cited as CBS Memorandum]. See also Comments of CBS on the Proposed Decree in *United States v. National Broadcasting Company, United States v. NBC*, Civ. No. 74-3601 (C.D. Cal., filed Dec. 10, 1974) [hereinafter cited as CBS Comments].

170. See notes 24-37 *supra*. The networks allege that the relief sought by the Justice Department is anticompetitive insofar as it will operate to concentrate production in large firms (i.e., the major motion picture studios) who are best able to assume the financial risks formerly shouldered by the networks. See CBS Comments, *supra* note 169, at 14-15. The networks additionally allege that the relief sought will foster entry barriers to those independent program suppliers that are unable or unwilling to assume the risks attendant on television production. *Id.* at 14A-17A (affidavit of Franklin M. Fisher). Alternatively, "smaller" independent producers may attempt to limit their risks by selling such risks to firms already involved in the business of acquiring these risks (i.e., the major motion picture studios). *Id.*

171. CBS Memorandum, *supra* note 169, at 25-26. The network's counteroffensive pre-saged the pro-network analysis of the government's claims offered in Fastow, *Competition, Competitors and the Government's Suit Against the Networks*, 22 ANTITRUST BULL. 517 (1977) [hereinafter cited as Fastow].

172. CBS Memorandum, *supra* note 169, at 27. Universal and Paramount Television's sale of programming to ABC, CBS, and NBC during the 1975-76 television broadcast season is offered as a persuasive example of this competition. *Id.* See also OWEN, *supra* note 14, at 28-31.

173. CBS Memorandum, *supra* note 169, at 27; see also Fastow, *supra* note 171, at 529. The networks allege that, although the proposed relief may result in a redistribution of



(iii) The networks' requests for identification by the Justice Department of contractual provisions it found unlawful produced no definite identification.<sup>174</sup> Thus, the networks reason, if "none of the contracts is in itself unlawful, then there is no unlawful contract and, hence, no Section 1 violation. . . . [A] section one claim cannot be sustained by reference to a 'course of conduct' where all of the agreements involved are themselves concededly innocent."<sup>175</sup>

In opposing the CBS motion for summary judgment,<sup>176</sup> the Justice Department addressed several of the foregoing assertions, intending solely to establish the presence of triable issues of fact. In so responding, plaintiff avoided confronting the substantive merits of defendant's answers. Notwithstanding, it is hoped that the following comments may shed some light on defendant's assertions.

In the absence of supporting evidence, it appears specious for the networks to suggest that restrictive provisions in network-supplier dealings are necessary to limit network production risks.<sup>177</sup> At best,

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income from NBC to certain suppliers, such a redistribution neither serves to increase competition nor further the public interest in promoting economically efficient organization. CBS Comments, *supra* note 169, at 5A (affidavit of Franklin M. Fisher). It is further alleged that the proposed reduction in the production of internally-generated programming by the networks will alter the supply of programs without altering the demand (i.e., the networks will still require three hours of prime-time programming each weeknight), thus resulting in a reduction of competition. CBS Comments, *supra* note 169, at 72A (affidavit of Richard Posner).

174. CBS Memorandum, *supra* note 169, at 29-30.

175. *Id.* at 31. Defendant notes that the cases cited by plaintiff in support of its "course of conduct" theory, *American Tobacco Co. v. United States*, 328 U.S. 781 (1945), *United States v. Patten*, 226 U.S. 525 (1913), and *Swift & Co. v. United States*, 196 U.S. 375 (1905), involved identifiable agreements that constitute *per se* violations of section one. *Id.* Other arguments posed by the networks are of lesser significance. See CBS Memorandum, *supra* note 169, at 31-35. Curiously, the network's seeming noncommittal strategies failed to advance a final argument posed by Fastow: namely that the networks' restrictive contractual provisions are necessary to avoid a possible monopoly bottleneck caused by a supplier graced with a "hit" show. Fastow, *supra* note 171, at 529-30.

176. See U.S. Memorandum, *supra* note 147.

177. To date such evidence has not been forthcoming. See generally CBS Memorandum, *supra* note 169, at 25-35. Fastow's analysis likewise fails to substantiate this basic assumption. See Fastow, *supra* note 171, at 525-29. If one may analogize the networks' insistence on restrictive provisions in their bargaining with suppliers to the networks' pre-1970 acquisition of financial and syndication rights in network-broadcast programs, then one would have expected initial payments to independent producers to decrease as the networks would have sought to limit their risk by lowering the initial cash outlay for a program series. This did not occur. See NOLL & PECK, *supra* note 14, at 83-84. See also A. REEL, *THE NETWORKS: HOW THEY STOLE THE SHOW* 132 (1979) [hereinafter cited as REEL].

these provisions are reasonable approximations of what unrestricted negotiation would produce net of its higher transaction costs;<sup>178</sup> at worst, they operate to subvert market forces to the disadvantage of independent suppliers.<sup>179</sup> Although easing such restrictive provisions may serve to reduce network profitability, the failure to do so may jeopardize the survival of program suppliers.<sup>180</sup>

The second issue raised by defendants is more complex in nature. It is true, as the networks assert, that it is in an oligopsonist's interest to promote efficiency among suppliers in order to profit from increased output and lowered pricing,<sup>181</sup> and that, accordingly, it would be counterproductive for them to suppress competition among suppliers.<sup>182</sup> Although this appears to hold true at the initial stage of acquisition, where suppliers' products are reasonably fungible, once an individual program achieves substantial popular acclaim it attains the status of a unique commodity and, therefore, it is to the networks' advantage to appropriate the "downstream" activities of the program in order to suppress later competition between itself and rival networks for the product.<sup>183</sup> In so acting, it is alleged that the networks have imposed severe hardships on independent suppliers at a time when network profits are soaring.<sup>184</sup>

The response to the networks' third contention is more forthright.<sup>185</sup> Failure to indicate specifically unlawful provisions in network-supplier agreements does not, of itself, preclude a finding

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178. See NOLL & PECK, *supra* note 14, at 63-64.

179. At minimum, network payments to independent suppliers must equal the amount received by the supplier were he to deal directly with each of the network's affiliates for the acquisition of programming, less the transaction and distribution costs inherent in such a venture. See NOLL & PECK, *supra* note 14, at 63, 304-05; OWEN, *supra* note 14, at 37-38. Conversely, the upper limit of payments to independent suppliers is limited by the attractiveness of non-network (e.g., syndication) alternatives. NOLL & PECK, *supra* note 14, at 63. Within these parameters, the competitive market, not the networks, should be permitted to dictate the price payable to program producers.

180. See U.S. Memorandum, *supra* note 147, at 10-11.

181. See Fastow, *supra* note 171, at 529.

182. CBS Memorandum, *supra* note 169, at 27. The government responded by positing that defendant's assertion belies the inferences raised by their course of conduct. U.S. Memorandum, *supra* note 147, at 8. The government also suggests that the networks profit from suppression of competition among suppliers due to their internal production capabilities and prerogative to preempt all available network time. *Id.*

183. See 1978-2 Trade Cases ¶ 62,394 at 76, 382-83.

184. U.S. Memorandum, *supra* note 147, at 10.

185. *Id.* at 9 n.6.

of a section one violation.<sup>186</sup> It has been held that "[e]ven an otherwise lawful device may be used as a weapon in restraint of trade or in an effort to monopolize a part of trade or commerce."<sup>187</sup> Thus, it is necessary to examine all network-imposed restraints in order to determine if their combined effect is the suppression of competition.<sup>188</sup>

## 2. *Sherman Act: Section Two Claims*

Section two of the Sherman Act<sup>189</sup> condemns "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize."<sup>190</sup> The offense of monopolization, as presently construed by the courts, necessitates a showing of monopoly power in the relevant market,<sup>191</sup> in addition to the intentional acquisition or maintenance of such monopoly power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.<sup>192</sup> Accordingly, any monopolization analysis must commence with a definition of the relevant market in which oppressive firm behavior is said to occur.<sup>193</sup>

The present posture of the case, as delimited by the granting of partial summary judgment,<sup>194</sup> charges the networks with using the monopoly power of their affiliate stations<sup>195</sup> to restrain competition among program suppliers in a submarket composed of each networks' prime-time entertainment programs.<sup>196</sup> The court's recogni-

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186. *Id.*

187. *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 119 (1948). *See also* *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946).

188. U.S. Memorandum, *supra* note 147, at 9 n.6.

189. 15 U.S.C. § 2 (1976).

190. *Id.*

191. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

192. *Id.* *See also* *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1270 (9th Cir. 1975).

193. *See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965).

194. *See generally* *United States v. Columbia Broadcasting System, Inc.*, 1978-2 Trade Cases ¶ 62,394 (C.D. Cal. 1977).

195. Specifically, the government alleges that each network has, "strung together a nationwide chain of government-granted monopolies in the form of television stations—much like a pool of patents or a package of copyrighted works," to exert its monopoly abuses. U.S. Memorandum, *supra* note 147, at 12-13.

196. 1978-2 Trade Cases ¶ 62,394 at 76,379. In so holding, Judge Kelleher approvingly cited a series of decisions affirming defendant's ability to monopolize a submarket consisting solely of its own products. *See Greyhound Computer Corp. v. International Business Mach.*,

tion of the existence of such submarkets obviates the need for assessing each defendant's monopoly power in the relevant submarket because, by definition, each defendant controls one hundred percent of each submarket.<sup>197</sup> Second, the networks will no longer be able to argue that their monopoly power was "thrust upon" them by the mere act of going into business<sup>198</sup> because, although their control of the initial program production market may be a function of their government-granted monopoly power, their control of the submarket, consisting of each network's prime-time entertainment programming, is intentionally affected through the contractual restraints discussed previously.<sup>199</sup>

A summary of the government's submarket monopoly theory is offered by Judge Kelleher:

The close interdependence alleged by the government between ABC, CBS and NBC in their purchasing policies means that, although the networks compete, to some extent in the primary market, the terms and conditions of their purchasing contracts are strikingly similar. All contracts control and appropriate the "downstream" activities of a unique prime-time entertainment idea. Further, contracts with producers bind them, in the future, with respect to new ideas. Thus, though there may be competition, to some extent, in the primary market at time One, the contracts and the market power of the networks create the very submarket the government complains of at times Two or Three (e.g. network control of spinoffs, foreign distribution, etc.).<sup>200</sup>

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Inc., 559 F.2d 488, 495-96 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); see also *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972). This market definition, however, is in sharp contrast to a majority of courts that have rejected a definition of the market as limited to defendant's own products and services. See *Telex Corp. v. IBM Corp.*, 510 F.2d 894, 914-25 (10th Cir. 1975); see also B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 695 n.61, 697 n.64 (1979) and sources cited therein. Plaintiff originally alleged monopolization by each defendant of the market composed of all national network prime-time programming. 1978-2 Trade Cases ¶ 62,395 at 76,379. The allegation was summarily dismissed. *Id.* at 76,384-5. In its decision, the court relied on Judge Learned Hand's dictum that while a ninety percent share of a market is sufficient to constitute a monopoly, "it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not." *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945), and, accordingly, found each network's seemingly invariable one-third share of the prime-time evening schedule insufficient to constitute a monopoly as a matter of law. 1978-2 Trade Cases ¶ 62,395 at 76,378-81.

197. The networks readily acknowledge this. CBS Memorandum, *supra* note 169, at 5.

198. The networks cited *Trixler Brokerage Co. v. Ralston Purina Co.*, 505 F.2d 1045, 1051 (9th Cir. 1974), and *Traveler's Ins. Co. v. Blue Cross*, 481 F.2d 80, 85 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973), in support of their position. CBS Memorandum, *supra* note 169, at 5.

199. See notes 148-63 *supra* and accompanying text.

200. 1978-2 Trade Cases ¶ 62,394, at 76,382.

The issue is certainly a complex one in which defendants' guilt or innocence will likely be determined by a reasoned appraisal of the fairness of the contractual restraints discussed in the preceding section.<sup>201</sup>

As the cases near resolution, either through settlement<sup>202</sup> or litigation, FCC proceedings regarding network program procurement have been recently reinstated. The impact of such parallel government enforcement proceedings will be discussed in the next section.

### V. Renewed FCC Inquiry into the Program Procurement Process and Developing Trends in Alternative Television Media

On January 14, 1977, the FCC instituted notice of its renewed inquiry into the alleged dominance of the broadcast industry by the television networks.<sup>203</sup> Although the Commission's interest was initially prodded by a petition for rulemaking submitted by Westinghouse Broadcasting, Inc.,<sup>204</sup> further reason for such a reexamination would undoubtedly have been provided by the terms of the NBC consent settlement,<sup>205</sup> as well as the Justice Department's apparent assumption of FCC regulatory responsibility.<sup>206</sup> The FCC has expressed its intention not to foreclose the pending government actions.<sup>207</sup> Nevertheless, implementation of different regulatory

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201. See generally HILLS, ANTITRUST ADVISOR 65, 66 (1971). If found innocent of monopolization, defendant may still be found guilty of attempted monopolization. The requisite elements of the offense were recently stated to comprise of, "first, a specific intent to control prices or destroy competition with respect to a part of commerce; second, predatory conduct directed toward accomplishing the unlawful purpose; and, third, a dangerous probability of success." *William Inglis & Sons v. ITT Continental Baking*, 461 F. Supp. 410, 416-17 (N.D. Cal. 1978).

202. To many, a settlement appears to be a reasonable course insofar as such a settlement would likely be modelled after the NBC Consent Decree—a less than demanding document vilified by a host of independent suppliers. See *United States v. National Broadcasting Co.*, 449 F. Supp. 1127 (C.D. Cal. 1978).

203. Commercial Television Network Practices, Notice of Inquiry, 62 F.C.C.2d. 548 (1977), [hereinafter cited as Network Inquiry].

204. *Id.* at 549. The petition called for a "comprehensive inquiry and rulemaking proceeding to review the changing role and function of the three national television networks." *Id.*

205. See note 202 *supra*.

206. The Justice Department filed comments in support of the Westinghouse petition while subtly cautioning the FCC against an inquiry into "those issues now being litigated in the Federal District Court in California." Letter from Honorable Donald I. Baker, Assistant Attorney General, Antitrust Division to the FCC, at 1-2 (Dec. 3, 1976) cited in Network Inquiry, *supra* note 203, at 549.

207. *Id.*

schemes could lead to confusion; additionally, the renewed FCC inquiry could have a discernible impact on any proposed remedies in the current antitrust litigation.<sup>208</sup>

Principally due to financial difficulties, the FCC investigation was temporarily halted on June 30, 1977.<sup>209</sup> After nearly one year, the inquiry was reactivated and a special investigative staff appointed to collect and analyze relevant data.<sup>210</sup> On October 19, 1978, the Commission stated its preliminary narrowing of the specific network practices to be addressed by the inquiry; in substance, these practices conform substantially to the pattern of alleged monopolistic abuses challenged by the Justice Department as discussed previously.<sup>211</sup> Since that time, the Commission has denied a motion by the Motion Picture Association of America to issue a declaratory judgment regarding the legality of several of the alleged offenses prosecuted in the antitrust actions as violative of the FCC's financial interest rule.<sup>212</sup> In declining to decide the issue, the Commission emphasized its concern for a thorough economic analysis of the program procurement process and its desire not to intrude on the pending actions.<sup>213</sup> Of greater relevance to this discussion, the Commission expressed its intent to focus its inquiry on network program procurement practices within the expanding context of broadcast industry structures and innovations in technology.<sup>214</sup>

Soon after the conclusion of the FCC's first investigation into

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208. This concern was first voiced in petitions submitted by ABC and CBS against the NBC Consent Decree. See *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1139 (C.D. Cal. 1978). Although Judge Kelleher recognized a "real and substantial" problem in differing regulatory approaches, he stated that the FCC inquiry should not deter the court from ordering appropriate relief. *Id.* Moreover, the court appeared to suggest that, should the FCC formulate its regulatory scheme subsequent to the implementation of a final judicial order, such scheme would likely be compelled to defer to "in place" antitrust relief. *Id.* Whether the converse would apply was not expressly addressed although such was suggested by the Supreme Court's holding in *California v. Federal Power Comm'n*, 369 U.S. 482, 490 (1962).

209. See *Commercial Television Network Practices*, Order, 67 F.C.C.2d 136 (1977) [hereinafter cited as *TV Network Practices*].

210. 43 Fed. Reg. 36444 (1978).

211. See generally *Commercial Television Network Practices*, Notice of Further Inquiry, 69 F.C.C.2d 1524 (1978) [hereinafter cited as *Notice of Inquiry (II)*].

212. See *In the Matter of MPPAA Petition Concerning Commercial Television Network Practices*, Opinion and Order, 70 F.C.C.2d 1443 (1979) [hereinafter cited as *MPPAA Petition*]. The financial interest rule is codified in 47 C.F.R. § 73.658(j)(i)-(ii) (1976).

213. See *MPPAA Petition*, *supra* note 212, at 1447.

214. See *Notice of Inquiry (II)*, *supra* note 211, at 1529-31.

network program procurement, questions were raised as to the economic efficiency of the Commission's rulemaking.<sup>215</sup> The procurement rules, it was argued, augmented rather than diminished the oligopsony power of the networks by concentrating their program-brokerage function<sup>216</sup> in a smaller time-frame. The correct method to dissipate network power, it was suggested, was not to tamper with the internal economics of the networks, but to alter the fundamental structure of broadcasting itself through the promotion of alternative program supply sources and distribution systems.<sup>217</sup> Although alternate distribution systems were operational at the time the FCC promulgated its procurement rules, the development and possible impact of alternate systems as commercially viable distribution modes had yet to be tested.

For example, since its inception in 1948, the cable television medium (CATV)<sup>218</sup> has exhibited a pattern of gradual expansion into largely urbanized areas.<sup>219</sup> As CATV matured into a viable segment of the communications industry, it began to pose competitive challenges to the entrenched networking structure. The FCC sought to

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215. See Crandall, *supra* note 10, at 394; Long, *Antitrust and the Television Networks: Restructuring Via Cable TV*, 6 ANTITRUST L. & ECON. REV. 99, 107-08 (1973) [hereinafter cited as Long].

216. See note 116 *supra* and accompanying text.

217. See Long, *supra* note 215, at 107-08. The alternative distribution systems referred to herein may be loosely defined as consisting of cable television systems (CATV), satellite broadcast systems and home video recorders. Other developments to be considered by the FCC are discussed in Notice of Inquiry (II), *supra* note 211, at 1529-30, and will not be discussed here. An excellent overview of the impending communications revolution's impact on a networker (NBC) is offered in Smith, *Television Enters the 80's*, N. Y. Times, Aug. 19, 1979, § 6 (Magazine), at 16 [hereinafter cited as Smith].

218. Broadly speaking, a cable television system is "a system of coaxial cable and associated electronic equipment operating from a central receiving point or tower by which television and radio broadcast signals are received directly off the air or by other indirect means for delivery for a fee to subscriber's premises." Cole, *A Cable TV System: Its Function and Operation*, 94 PRACTISING LAW INSTITUTE, CURRENT DEVELOPMENTS IN CATV, TV AND PAY TELEVISION 13 (1978). The significance of CATV in this context is its ability to carry an unlimited set of broadcast signals in contrast to the limited character of the over-the-air broadcast spectrum.

219. The growth of cable television has been far from explosive. See generally MACAVOY, *Deregulation of Cable Television* (1977). In 1959, there were 560 cable systems and 550,000 cable households; by 1969, the number had risen to 2,260 cable systems and 3.6 million cable households. See D. LEDUC, *Cable Television and the FCC* (1973). Today, it is estimated that there are in excess of seven and one-half million cable household subscribers largely concentrated in the highly urbanized "top 50" broadcast markets. See 71 F.C.C.2d 632, 663-64 (1979).

define the scope of its authority<sup>220</sup> to regulate CATV through a series of seemingly unrelated regulatory attempts, all of which met with varying degrees of acceptance.<sup>221</sup> Despite this piecemeal approach, FCC rulemaking in the CATV arena is apparently prompted by a notion that the public interest is best served by pro-competitive strategies.<sup>222</sup>

A similar approach has broadened the accessibility of domestic satellite transmission systems. Satellites have become an integrated segment of the television industry.<sup>223</sup> Although formidable dish-like antennae were formerly required to receive satellite signals, revolutionary advances in electronics technology have enabled smaller, relatively inexpensive antennae to be utilized in conjunction with CATV systems.<sup>224</sup> Current estimates foresee eventual introduction of "earth station" ownership into the consumer market.

A related development is the mass acceptance of home video recording systems (VTR's).<sup>225</sup> Although prospects for the VTR market are clouded by litigation,<sup>226</sup> inconsistent technical standards, and initial consumer resistance,<sup>227</sup> experts anticipate ten million VTR's

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220. The Supreme Court has construed the Communications Act of 1934, 47 U.S.C. § 152 1962 as authorizing the regulation of CATV by the FCC as an exercise of its ancillary jurisdiction over broadcast material. *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 173-76 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649, 667-68 (1972). *See also* Cable Television, Report and Order, 36 F.C.C.2d 143 (1972).

221. A comprehensive appraisal of the efficacy of FCC regulation is offered in D. LeDuc, *CABLE TELEVISION AND THE FCC* (1973). *See also* *Inquiry Into The Economic Relationship Between Television Broadcasting and Cable Television*, 71 F.C.C.2d 632 (1979).

222. *Id.* at 640-44. A glaring exception to this approach, equally premised on "public interest" considerations, is the FCC's promulgation of the anti-siphoning rules. 47 C.F.R. § 76.225 (1975). The rules were subsequently invalidated in *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

223. *See generally* M. BOTEIN & S. ROBB, *COMPETITION VS. RESPONSIBILITY: THE CASE OF THE MASS MEDIA* 166-67 (1978).

224. *Id.* at 167. As the number of such "earth stations" multiply, their advantages will be maximized and the cost per subscriber will decrease. The result should be increased program services through satellite transmission. *Id.* *See also* Smith, *supra* note 217, at 18.

225. Smith, *supra* note 217, at 17-18.

226. *See, e.g.*, Note, *Betamax and Copyright: The Home Videorecording Controversy*, 1 WHITTIER L. REV. 229 (1979); Comment, *Betamax and Infringement of Television Copyright*, 1977 DUKE L.J. 1181.

227. Initial consumer resistance was related to the high prices that accompanied the introduction of the videocassette recorder. The impact of competition has broadened consumer acceptance due to lowered pricing. *See* NEWSWEEK, Apr. 3, 1978, at 85.



in use by 1985 and, ultimately fifty to sixty percent market penetration.<sup>228</sup>

Assuming the continuance of present regulatory schemes, the net impact of these developing technologies on the present network structure is, at best, speculative. Assuming that network monopoly power is rooted in the presently limited character of the electromagnetic broadcast spectrum,<sup>229</sup> it may be inferred that the expansion of the broadcast spectrum through the proliferation of the aforementioned technologies will operate to dissipate network power.<sup>230</sup> If transactional efficiencies and profit maximization by local broadcasters are augmented by the new technologies, the market may see a gradual movement of affiliates away from network dependence.<sup>231</sup> Advertising revenues are likely to suffer as a multiplicity of program sources fragment the viewing audience, while simultaneously disrupting the demographics of network scheduling.<sup>232</sup> In relation to the limited scope of this inquiry, it is apparent that the inequities of the present program procurement process will be substantially lessened by these developing communications structures. As potential program buyers multiply, network power recedes and sellers are free to exact terms consonant with their actual market power.

The FCC expressly recognized the transformations in network structure promised by the new technologies when it stated:

As a result of these developments and others, it is now possible to conceive of a broadcasting system, for example, in which television licensees would be able to choose among programs from existing networks or new, over-the-air networks or to engage in joint ventures directly with program suppliers. Similarly, program suppliers not only may have these new bidders for their wares, but also might sell programs for exhibition on many cable systems or non-commercial public stations, or distribute directly to viewers via cassettes or discs. . . . We do not mean to assert that any of these alternative forms of networking is certain to develop or, if it did, would displace the existing networks or be beneficial to the public. Rather, our point is that each of these possibilities ought to be a subject of study by the inquiry. To evaluate fully for the 1980's the central issue posed by the initial Notice—network domi-

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228. This is a conservative estimate. See BROADCASTING, Oct. 24, 1977, at 32.

229. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 546 (2d ed. 1977). See also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-89, 394 (1968); *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943).

230. See Long, *supra* note 215, at 107-08.

231. *Id.*

232. *Id.* See also Smith, *supra* note 217, at 66.

nance—one cannot take as a given the exclusivity or immutability of the present form of networking.<sup>233</sup>

The FCC has made a preliminary assessment of the allocative and distributive effects of lessened regulation of the new technologies and found them compatible with its legislative mandate.

## VI. Conclusion

This Comment has sought to develop a historical perspective on regulatory approaches to anticompetitive behavior in the procurement of television programming by the national networks. It is apparent that the networks have shown a remarkable resiliency to regulatory initiatives, having implemented elaborate strategies intended to consolidate their control over program procurement. One decade after the promulgation of the FCC's Program Procurement Rules and six years after the filing of the Justice Department suits, network overreaching in the acquisition of programming continues unabated. This resiliency stems from regulatory inability or unwillingness to alter the structural character of networking itself. The present network structure is not immutable; it arose as a convenient means of maximizing transactional efficiencies in the production, distribution, and exhibition of television programming. It resulted in the centralization of the program procurement function in the three network corporations, bringing with it the ills attendant on that degree of concentration.

Recent technological advances suggest that present network structure has outlived its usefulness. It is hoped that the FCC's intention to situate its new inquiry within the context of alternative distribution technologies will pave the way for the dissipation of network power and, with it, an end to abuses in the program procurement process.

*Mario J. Suarez*

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233. Notice of Inquiry (II), *supra* note 211, at 1530-31.

